Supreme Court, U.S.
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No. 92-564

In The

Supreme Court of the United States

October Term, 1992

BONNIE BOERER,

Petitioner,

v.

RONNA ZAKEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Plaintiff Ronna Zaken was fired soon after her employer, Defendant Bonnie Boerer, discovered that she was pregnant. Just six months earlier, defendant had fired plaintiff's predecessor, Robin Weinberg, after learning that Weinberg was pregnant.

Plaintiff first notified her direct supervisor, Allan Kohn, defendant's Vice President, in October 1988, of her pregnancy. Kohn cautioned plaintiff not to tell defendant and suggested that he inform defendant himself at some later time. During the ensuing three months, Kohn kept defendant informed of plaintiff's work progress by supplying defendant with daily sales sheets on which all of plaintiff's activities and sales were recorded; however, Kohn did not tell defendant about plaintiff's pregnancy. At the end of December 1988, defendant learned of plaintiff's pregnancy and it was at that time, for the first time, that plaintiff heard any criticism of her work. Plaintiff was told by Sanford Sessler, Allan Kohn's successor, that defendant decided plaintiff was not qualified and consequently, would not give plaintiff a year end bonus. When plaintiff questioned Sessler about the effect of her pregnancy on this decision, Sessler replied that "it doesn't help."

One month later, plaintiff was terminated. Sessler informed plaintiff that he had unsuccessfully fought her termination and offered to give her a recommendation letter. Two weeks later, he wrote that plaintiff's "administrative skills, attention to detail, work ethics and ability to communicate were outstanding."

Plaintiff subsequently filed a pregnancy discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and the New York Human Rights Law Executive Law § 290 et seq. At trial, plaintiff sought to introduce a statement made to another employee by one of the officers of the company that plaintiff's predecessor had been terminated because of her pregnancy. The trial court excluded the statement erroneously believing that it could not be used against the individual owner of the company. The trial court also incorrectly determined that the statement was cumulative evidence.

At the conclusion of the trial, the jury submitted a number of questions to the trial court regarding plaintiff's burden of proof. In response to a question from the jury regarding the definition of "motivating role," the court instructed in a supplemental charge that the word "motive" meant "prompting a person to act." The court's definition incorrectly characterized the plaintiff's burden as requiring plaintiff to prove that her pregnancy was the primary factor or the reason that prompted defendant's actions.

The jury returned a verdict for defendant. The trial court adopted the jury's findings on the state law discrimination claim and found for defendant on the Title VII claim.

The Court of Appeals reversed the lower court's decision and remanded the case for a new trial. It found that both the ruling denying the admissibility of the officer's statement against the individual defendant and the definition of a motivating role were in error.

The Appellate Court also found that the trial court incorrectly decided that the statements were cumulative, but petitioner has not included that issue in her petition.

REASONS FOR DENYING THE WRIT

I. THE SECOND CIRCUIT COURT OF APPEALS' EXPLANATION OF A TITLE VII PLAINTIFF'S BURDEN OF PROOF IS CONSISTENT WITH THIS COURT'S DECISION IN PRICE WATERHOUSE V. HOPKINS.

In rejecting the lower court's definition of a motivating role as that which "prompts a person to act," the Appellate Court relied, almost exclusively, on this Court's opinion in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The definition "prompts a person to act," the Appellate Court reasoned, improperly conveyed the notion that plaintiff's pregnancy had to be the primary or the most significant reason for the adverse employment action. Citing this Court, the Appellate Court determined that "[a] plaintiff is not required 'to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges.'" Zaken v. Boerer, 964 F.2d 1319, 1325 (2d Cir. 1992), citing, Price Waterhouse, 490 U.S. at 241. Still citing this Court, the Appellate Court continued, "[i]nstead, she need only 'prove that the employer relied upon sex-based considerations in coming to its decision.'" Zaken, 964 F.2d at 1325, citing, Price Waterhouse, 490 U.S. at 242.

The Appellate Court did not deviate from this Court's delineation of a plaintiff's burden of proof, as defendant suggests. Indeed, it is this Court's definition of motivating role, which the lower court rejected, that the Appellate Court adopted. Specifically, the Appellate Court stated:

> The Supreme Court instructs that: '[i]n saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was [pregnant].'

(emphasis added). Zaken, 964 F.2d at 1325, citing, Price Waterhouse, 490 U.S. at 250.

Moreover, the Appellate Court's decision that a plaintiff satisfies her initial burden by demonstrating that "her pregnancy played a part in defendant's decision," which defendant has asked this Court to reverse, is merely a repetition of this Court's language in Price Waterhouse wherein this Court held:

> If the plaintiff fails to satisfy the fact-finder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following Burdine, that the employer's stated reason for its decision is pretextual.

Id. at 247 n.12. (emphasis added).

Since a plaintiff could not possibly know, none-the-less prove, the levels of importance each factor has in a defendant's decision-making thought process, proving that an illegal factor was one of the factors that a defendant relied on is the only reasonable and realistic way a plaintiff could meet her initial burden. Indeed, it is only the defendant that has the ability to expose that thought process and show whether or not the illegal factor occupied a significant part of its thoughts. The burden of proof articulated by this Court in Price Waterhouse and reiterated by the Appellate Court in the decision below, allocates to each party a burden which corresponds to the evidence available to that party. The Appellate Court has done nothing here to increase or lessen that burden.

II. THE SECOND CIRCUIT PROPERLY CONCLUDED THAT THE ADMISSION BY DEFENDANT'S AGENT WAS ADMISSIBLE EVIDENCE.

Defendant has requested this Court to review the relevancy of an admission made by one of defendant's agents. Although presented in terms of relevancy, the arguments offered by defendant concern issues of credibility and weight, neither of which are appropriate areas for review. Further, even if defendant actually raised substantive issues of relevancy, plaintiff respectfully suggests that this still would not be worthy of this Court's review.

Defendant's arguments concern a statement made by Ed Newman, defendant's Vice President, to another employee. Mr. Newman admitted that plaintiff's predecessor was terminated because of her pregnancy.

Defendant argues that since she presented evidence at trial that she had not terminated everyone who had become pregnant while at her company, the Newman statement is not relevant and should not be believed. Defendant further argues that the testimony of plaintiff's predecessor, Robin Weinberg, regarding discriminatory statements made by defendant at Weinberg's employment interview, was contradicted by defendant's testimony and, therefore, by some leap of logic, Newman's statement could not be true. Not only are these arguments without factual merit, they have no bearing, whatsoever, on the determination of admissibility.

Similarly, defendant inappropriately attempts to use the Appellate Court's decision in Haskell v. Kaman Corp., 743 F.2d 113 (2d Cir. 1984) as a basis for excluding the Newman statement. Although this argument facially frames an issue of relevancy, it, too, turns out to be an argument about weight rather than admissibility.

The Haskell decision concerned a plaintiff's statistical evidence regarding terminations which had occurred during an eleven year period prior to the plaintiff's termination. Not surprisingly, the Second Circuit determined that terminations which had occurred up to eleven years before the plaintiff's termination were simply too remote in time to be relevant. In addition, the Appellate Court decided that a handful of employees was not a sufficient number to establish a statistical level of significance.

None of the issues in Haskell are present here. Plaintiff is neither attempting to use statistical evidence nor is she referring to any termination that occurred

years prior to her termination. The evidence, here, involves the termination of plaintiff's predecessor who was also fired when she was pregnant just six months before plaintiff was fired. Thus, unlike the facts in Haskell, the relevancy of Weinberg's termination is quite clear.

Defendant does not, as she cannot, claim here that the Newman statement fails the Rule 801(d)(2)(D) agency requirements.

Given the level of control defendant had over her company, the Appellate Court properly concluded that Newman was acting as defendant's agent in carrying out his duties as Vice President. Further, since Newman was acting within the scope of his employment when he made the statement, the agency requirement for the purposes of admissibility under Rule 801(d)(2)(D) was satisfied. See, United States v. Paxon, 861 F.2d 730, 734 (D.C. Cir. 1988), United States v. Young, 736 F.2d 565, 567 (10th Cir. 1984), rev'd on other grounds, 470 U.S. 1, 105 S.Ct. 1038, remanded, 758 F.2d 514, reconsidered, 767 F.2d 737 (1985), United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974), cert. denied, 419 U.S. 826, 95 S.Ct. 43 (1974), United States v. Gregory, 871 F.2d 1239 (4th Cir. 1989), cert. denied, 493 U.S. 1020, 110 S.Ct. 720 (1990).

Defendant, however, has not raised the agency issue under Rule 801(d)(2)(D) for this Court to review. Rather, the thrust of defendant's argument for the exclusion of the Newman statement is defendant's belief that the statement lacks credibility because of evidence defendant introduced. Since credibility is not the standard for admissibility, defendant's arguments raise no reviewable issues.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that petitioner's petition for writ of certiorari be denied.

Respectfully Submitted,

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